SUPREME COURT

001817 JUN - 6 2001

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No.

IN THE

United States Supreme Court

KELLY MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE TEXAS DEPARTMENT OF PUBLIC SAFETY LACK BOTH REASONABLE SUSPICION AND/OR PROBABLE CAUSE TO STOP THE PETITIONER'S VEHICLE FOR BRIEFLY DRIFTING OUT OF THE LANE IT WAS IN WHERE TEXAS LAW IS SPECIFICALLY WORDED TO NOT MAKE SUCH DRIFTS A TRAFFIC VIOLATION?

II. WHERE THE PETITIONER CANDIDLY ADMITTED HIS INVOLVEMENT IN THE OFFENSE AND TIMELY TENDERED A GUILTY PLEA TO THE CHARGE OF POSSESSION WITH INTENT TO DISTRIBUTE COCAINE, SHOULD HIS USE OF MARIJUANA WHILE ON BOND DISQUALIFY HIM FROM RECEIVING CREDIT FOR ACCEPTANCE OF RESPONSIBILITY UNDER U.S.S.G. §3E1.1?

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JURISDICTION AND OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is dated June 15, 2000, (App. 1a). The opinion denying rehearing and rehearing en banc is dated July 28, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254, (App. 2a).

The time limit for filing for certiorari is not jurisdictional. *See Taglianati v United States*, 394 US 316, 89 S Ct 1099, 22 Led 2d 302 (1969). An affidavit explaining the delay is being filed contemporaneously.

The lower court rulings are unpublished.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.S.G. § 3E1.1 provides:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection
>
> (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
>
> (1) timely providing complete information to the government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level.

STATEMENT OF CASE

This is an appeal from the Petitioner's plea based conviction to one count of violating 21 U.S.C. § 841(a)(1). This plea agreement was a conditional plea which specifically preserved the Petitioner's search and seizure claim. (Rule Eleven Agreement, R. 11, ¶9).

On October 21, 1998, Petitioner was charged by complaint with one count of possession with intent to distribute more than five kilograms of cocaine hydrochloride in violation of 21 U.S.C. § 841(a)(1), (Indictment, R.14).[1] Petitioner was released on bond pending the disposition of this case, (Order Setting Conditions of Release).

On February 9, 1999, Petitioner brought a motion to suppress the cocaine seized against him challenging the validity of the stop of the vehicle he was driving, his detention, and the ensuing search, (Motion for an Evidentiary Hearing and to Suppress). On March 8, 1999, the District Court conducted an evidentiary hearing on the Petitioner's motion. The District Court orally denied the motion at that time, and entered formal orders on the subject on March 24, 1999, (Findings of Facts and Conclusions of Law, R. 109).

After this, the Petitioner changed his plea to guilty and reserved the right to challenge the search on appeal, (Rule 11 Agreement, R. 98).

Sentencing was held on August 3, 1999. At sentencing, the Petitioner challenged the Probation Department's recommendation that the Petitioner be denied credit for responsibility based on acts of controlled substance abuse, (Sealed Objection to PSI, R. 130; Brief Regarding Applicability of Sentencing Guidelines, R. 138). The District Court overruled the Petitioner's recommendation and sentenced the Petitioner to 151 months incarceration, (Judgment in a Criminal Case, R. 159). Petitioner's Notice of Appeal was filed on August 13, 1999.

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[1]An indictment filed on November 4, 1998 restated these charges against the Petitioner.

i. *Proceedings Related to the Search and Seizure Claim.*

On October 4, 1998, Petitioner Martin was stopped while traveling on US-59 for allegedly momentarily crossing over a traffic lane while hanging up a cellular call.[2] As a result of the stop, the investigating officer ultimately discovered a hidden compartment in the Petitioner's vehicle which contained roughly 50 pounds of cocaine.

Defendant challenged the search by written motion. That motion alleged two separate theories for the attack. First, the Petitioner argued that the arresting officer did not have probable cause to stop the Petitioner for momentarily drifting over a white line on the right side of the road as Texas law requires a person to remain in their traffic lane "as near as practical" and permits moving from the lane as long as it can be done safely.[3] Petitioner also contended that the officer's search of the Petitioner's car exceeded the scope of the consent.

Following consent, the officer engaged in a search of the vehicle which lasted ten minutes. This included a highly detailed search of the driver's area, hood compartment, back seat, trunk, and luggage in the trunk.[4]

Apparently, during the officer's search of the backseat, the officer found some evidence of a hidden

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[2]The facts contained in this motion are taken from the counsel's viewing of the traffic stop in this matter. A copy of the video tape was admitted below (See Suppression Hearing Transcript "SHT", 21). The tape was played from the time of the Petitioner's stop through the time that the backup unit arrived, (S.H.T. 22).

[3]*See* Issue I, *infra.*

[4]18:04:05.

compartment in the passenger compartment.[5] The officer called for reenforcement, reentered the car, and began searching the back seat. While the interior search of the car was not filmed at this point, the officer apparently found a hidden compartment in the rear of motor vehicle which was not within lunging distance of the defendant.[6] Petitioner was frisked at 18:07:39 and handcuffed.

The arresting officer's testimony (Texas Department of Public Safety Officer Hulon Bagget) testimony was similar to the evidence presented on the tape, but there was some variance. He testified that on October 4, 1998 he was on routine patrol on U.S. 59 in Panloa County, near Carthage Texas, (S.H.T. 8).

The officer noticed the Petitioner's car when it drove onto the paved shoulder of the road. According to the officer:

> The blue Lumina went from the inside lane, partially – went from the outside lane partially into the inside lane without signalling an intent. It straddled the center divider of the two northbound lane, and then drove back into the outside lane.

(Tr. 9). By the Officer's estimation, the vehicle traveled three feet into the next lane, Id. The swerving motion was "one motion" and lasted roughly two seconds; Id. at 9. The officer decided to pull the vehicle over to insure that the driver was not intoxicated, inattentive, or drowsy, (Tr. 10). He activated the emergency flashers and pulled the Petitioner over.

The officer testified that the Petitioner did not appear

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[5]The officer testified that he had spotted to bricks of what he believed to be a controlled substance under the back seat, but acted as if he did not see them so that he would not arouse the Petitioner's suspicion, (S.H.T. 16).

[6]18:03:39.

intoxicated, (Tr. 11). The officer did not "believe that" the Petitioner gave an explanation for crossing over the center line, (Id.).[11]

The officer testified that he secured the Petitioner's consent to search the car and while he was looking around, he spotted a gap in the way that the back seat was sitting in the back which caused him to look under the seat. The officer then peeked under the seat and saw two suspicious brick packages under the back passenger seats. Not wanting to alert the Petitioner at this time, the officer pretended not to notice these bricks, went to the front of the car, opened the hood and while searching under the hood, secretly called for backup, (S.H.T. 18).

With the officer on the stand, the Court questioned the officer about the stop. The officer answered questions as the tape was being played regarding various aspects of the stop, (S.H.T. 22-25).

On cross-examination, defense counsel focused on the Texas traffic code and how it penalized accidental drifts out of a lane which were not unsafe in nature, (S.H.T. 31). Counsel also brought out the brief nature of the alleged violation:

Q. His left wheels crossed over into the second lane?

A. Yes, sir.

Q. After his wheels crossed, they crossed back into the right lane?

A. Yes, sir.

(S.H.T. 33-34). Nothing that the officer remembered about the movement was unsafe, (S.H.T. at 34). No other violations were observed and no accidents resulted as a result of the movement, (S.H.T. at 35). Further, the actions were

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[11]Compare this with the Petitioner's explanation for the swerve audible on the officer's video tape admitted below.

isolated and did not recur during the time of the officer's observations, (S.H.T. 35).

Even though the Petitioner's license came back clear, the officer never informed the Petitioner that he had a right to leave, (S.H.T. 45). The officer testified that he never offered this information, but responded truthfully if asked by the person, *Id.*

On redirect examination the officer testified that the type of swerve involved in this case was "very similar" to that of an intoxicated driver losing control of the vehicle, (S.H.T. at 47). Following the conclusion of the officer's testimony, the Government introduced a copy of a pretrial services report showing that the Petitioner had five positive urine specimens while on bond which indicated marijuana usage on his part, (S.H.T. at 49).

The Court orally denied the Petitioner's motion to suppress at this time. On March 24, 1994, the trial court entered its written motion denying the Petitioner's motion to suppress. The Court found that there was reasonable suspicion and or probable cause to stop the Petitioner because the movement previously described, together without signaling while executing it, constituted a traffic violation. Further the movement raised reasonable suspicion that the Petitioner could have been intoxicated, (Findings of Fact and Conclusion of Law, R. 113). After this ruling, the Petitioner tendered a guilty plea as charged, but reserved the search and seizure question for review by this Court, (Rule 11 Agreement).

ii. Sentencing.

Based on the Petitioner's substance abuse problems while on bond, the Probation Department recommended that the trial judge deny the Petitioner credit for acceptance of responsibility, U.S.S.G. §3E1.1. Petitioner objected to this and filed a brief specifically addressing this question, (Defendant's Brief Regarding Credit for Acceptance of Responsibility Under SSSG §3E1.1, R. 130). This brief argued that Fifth Circuit case law permitted the Court to grant such credit in its discretion. The brief further urged the Court

to reconsider the case law that permitted the denial of this credit based on later acts of substance abuse, Id.

The Government opposed the Petitioner's actions arguing that the Petitioner's conduct represented a new crime committed while on bond, (Sent Tr. At 5). The District Court rejected the Petitioner's challenge without elaboration, (Sent. Tr. At 7).

Defendant appealed his conviction to this Court. On June 13, 2000, a panel of this Court affirmed the Petitioner's conviction in a per curiam order which simply stated that after consideration of the arguments of counsel it was not persuaded that reversible error was committed.

The Petitioner's conviction was affirmed in an unpublished Fifth Circuit Opinion, (Addendum 1a), Rehearing en banc was denied on July 28, 2000, (Addendum 3a).

This petition now follows.

REASONS FOR GRANTING WRIT

I. THE TEXAS DEPARTMENT OF PUBLIC SAFETY LACKED BOTH REASONABLE SUSPICION AND/OR PROBABLE CAUSE TO STOP THE PETITIONER'S VEHICLE FOR BRIEFLY DRIFTING OUT OF THE LANE IT WAS IN WHERE TEXAS LAW IS SPECIFICALLY WORDED TO NOT MAKE SUCH DRIFTS A TRAFFIC VIOLATION.

Texas Police Officers are regularly pulling individuals over for drifting over the white lane. The Texas Legislature and Texas Courts have said that such conduct is not unlawful.[12] Further, these Courts have rejected attempts by the officers to recast such stops as reasonable suspicion to stop these individuals out of stated concerns that the individuals may be driving drunk or falling asleep.[13] Texas

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[12]Under Texas law, straying over a lane marker is only a violation of the law if the movement is in someway unsafe. As currently codified, the law provides:

> An operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly *as practical* entirely within a single lane; and (2) *may not move from the lane unless that movement can be made safely.*

TEX. TRANSP. CODE §545.060 (emphasis added). The elements of this violation are: (1) a person; (2) drives or operates; (3) a motor vehicle (4) within a single marked lane, and (5) moves from that lane without first ascertaining that such movement can be made with safety. *Adkins v. State*, 848 S.W2d 813 (Tex App – Houston 1993).

[13]*See Aviles v. State*, 2000 Tex App LEXIS 3307 (Tex App – Houston, 2000); *Ehrhart v State*, 9 S.W.3d 929 (Tex App. – Beaumont, 2000); State *v. Arriaga*, 5 S.W.2d 804 (Tex. App. – San Antonio, 1999); *Hernandez v. State*, 983 S.W.2d 867 (Tex App. – Austin 1998, review den.); *State v. Tarvin*, 972 S.W.2d

(continued...)

Courts have required multiple acts of lane crossings before such the act is deemed suspicious.[14] Despite numerous cases supporting the Petitioner's view in this exact fact pattern, the panel hearing this case has chosen to uphold such conduct without discussion. As a result of this decision, the panel has invited our federal courts to be a haven for these alleged traffic stops.

The panel decision in this case is also at odds with decision of the United States Court of Appeals for the Sixth and Tenth Circuits. *United States v. Freeman*,209 F.3d 464 (6th Cir. 2000); *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996).

In *United States v. Freeman*,209 F.3d 464 (6th Cir. 2000), the court found that a similar lane crossing did not create reasonable suspicion to stop an individual where Tennessee law also provided that the vehicle "shall be driven as nearly as practicable entirely within a single lane." The Petitioner was driving a motor home and briefly drifted over the lane. The Court held that this did not constitute grounds to stop the individual. The Court also said that failing to "follow a perfect vector down the highway" did not constitute of drunk driving. The facts in the *Gregory* decision are similar to those in *Freeman*.

The panel decision in this case is also at odds with decision of various circuits which have held that a police officer misunderstanding of state traffic laws can not create probable cause. *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999) (officer's mistaken belief that Texas law prohibited driving with a broken taillight, there was no probable cause to stop the Petitioner for having a broken taillight); *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998) (there was no probable cause to stop the Petitioner for turning

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[13](...continued)
910 (Tex App. - Waco, 1998).

[14]*See, eg. Gajewski v. State*, 944 S.W.2d 450 (Tex App – Houston 1997, no writ).

on his turn signal and not changing lanes where Texas law did not require a turn or lane change after signalling). *See also United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000) (relying on Fifth Circuit precedent to find that officer's mistaken belief regarding license plate requirements for Mexican vehicles could not constitute probable cause).[15]

The ruling in this case is directly contrary to the principles stated in the foregoing rulings. Unless this Court agrees to hear this case, this pattern of conduct will remain in full effect and unchecked.

II. WHERE THE PETITIONER CANDIDLY ADMITTED HIS INVOLVEMENT IN THE OFFENSE AND TIMELY TENDERED A GUILTY PLEA TO THE CHARGE OF POSSESSION WITH INTENT TO DISTRIBUTE COCAINE, HIS USE OF MARIJUANA WHILE ON BOND SHOULD NOT DISQUALIFY HIM FROM RECEIVING CREDIT FOR ACCEPTANCE OF RESPONSIBILITY UNDER U.S.S.G. §3E1.1.

Even though the Petitioner thoroughly admitted his involvement in the instant offense he was denied credit for acceptance of responsibility under U.S.S.G. §3E1.1. because he committed subsequent acts of drug abuse while on bond.

The lower court relying on Fifth Circuit authority denied the Petitioner the credit finding that even unrelated acts of abuse undercut a Petitioner's claim to acceptance of responsibility. *United States v. Watkins*, 911 F.3d 983 (5th Cir. 1990).

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[15]In the Fifth Circuit, the Government attempted to distinguish the Petitioner's cases based on the officer's self-serving claims of furtive gestures. Such claims should be given little support. Like furtive gesture testimony, the officer's correlation testimony should not be permitted to transform innocent behavior into reasonable suspicion or probable cause. *Sibron v. New York*, 392 U.S. 40, 88 S . Ct. 1889, 20 Led 2d 917 (1968); *People v. Goessl*, 186 Colo. 208, 526 P.2d 664 (1974); *People v. Superior Court of Yolo County*, 3 Cal. 3d 807, 91 Cal. Rptr. 729, 478 P.2d 449 (1970).

Watkins mandates this result based on the premise that that §3E1.1 is broadly written. *Watkins* also holds that the Court has the discretion to consider subsequent abuse, but it does not mandate this consideration.

In *United States v. Morrison*, 983 F.2d 730 (6th Cir. 1993), the Sixth Circuit expressly rejected this Court's holding in *Watkins* and stated:

> We hold that acceptance of responsibility, as contemplated by the United States Sentencing Commission, is "acceptance of responsibility for his offense, " Guidelines § 3E1.1(a) (Nov. 1992) (emphasis added), not for "illegal conduct" generally. Considering unrelated criminal conduct unfairly penalizes a defendant for a criminal disposition, when true remorse for specific criminal behavior is the issue.

Morrisson, at 735.

The principal reason for the acceptance of responsibility variable is the recognition that an individual who demonstrate genuine remorse has a better prospect for rehabilitation. The United States Supreme Court has recognized that such a Petitioner has: "demonstrated by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady v. United States*, 397 U.S. 742, 753 (1969). *See also* M.M. O'Hear, *Symposium: The Federal Sentencing Guidelines: Ten Years Later: Remorse, Cooperation and Acceptance of Responsibility: the Structure, Implementation, and Reform of Section 3E1.1. fo the Federal Sentencing Guidelines*, 91 N.W. U.L. Rev. 1507, 1515 (1997).

This Court should grant certiorari to resolve this conflict.

RELIEF REQUESTED

For all of the reasons stated above, Petitioner requests this Court issue a writ of certiorari or alternatively remand this matter for further proceedings in the Fifth Circuit.

Respectfully submitted,

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DATED: May 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40939

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KELLY LEWIS MARTIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:98-CR-72)

Before DAVIS, DUHE and DENNIS, Circuit Judges.
PER CURIAM:*

After considering the briefs and the argument of counsel, we are persuaded that the district court committed no reversible error.

AFFIRMED.

*Pursuant to 5TH Cir. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIF. R. 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No- 99-40939

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

KELLY LEWIS MARTIN

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Texas, Tyler

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 6/13/00,5 Cir., F.3d_)

Before DAVIS, DUNE and DENNIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Ffin_R.Apa.P. and 5TH CIR.R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R. App. P. and 5TH CIR. R. 35) the petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge